CHIN KUI FOH v. SIME DARBY INDUSTRIAL SDN BHD

COURT OF APPEAL, KOTA KINABALU
MOHD ZAWAWI SALLEH JCA
ABANG ISKANDAR JCA
AHMADI ASNAWI JCA
[CIVIL APPEAL NO: S-02(IM)-1311-08-2015]
17 APRIL 2017

DAMAGES: *Assessment – Date of assessment of damages – Assessment of damages for breach of sale and purchase agreement of lands – Cut-off date for assessment of damages – Whether should be based on value of land as at date of assessment – Whether damages to be assessed as at date of breach of contract – Circumstances of case – Whether depended on where scale of justice tipped*

The appellant ('plaintiff') and the respondent ('defendant') entered into an agreement wherein the defendant agreed to sell three parcels of land ('the lands') to the plaintiff at the agreed price of RM1.9 million. Consequent thereto, the plaintiff paid 10% of the purchase price for the lands. However, the defendant deferred the signing of the contracts on the ground that there was a suit pending between Syarikat Pertanian Emmal ('Emmal') and the defendant, the subject matter of which was the lands ('Suit 03'). Suit 03 was decided against the defendant and the defendant was ordered to sell the lands to Emmal. As the property was no longer available, the plaintiff commenced an action for damages against the defendant. Pursuant to O. 14A and O. 33 r. 2 of the Rules of Court 2012, the High Court allowed the plaintiff's claim. Aggrieved with the decision, the defendant appealed to the Court of Appeal but the appeal was dismissed and the parties proceeded for assessment of damages. During the assessment proceedings, the issue before the Deputy Registrar ('DR') was what would be the effective date upon which to assess the damages. The plaintiff's stand was that the damages should be assessed by reference to the value of lands at the date of assessment, *ie*, 1 May 2014. On the contrary, the defendant submitted that the date to assess the damages was the date of breach *ie*, 30 May 2005 by virtue of s. 74 of the Contracts Act 1950. The DR assessed the value of the land as at the date of the breach *ie*, 30 May 2005. Dissatisfied with the assessment, the plaintiff appealed to the Judge in Chambers who affirmed the decision of the DR. Hence, this appeal by the plaintiff.

Held (allowing appeal with costs here and below; setting aside decision of High Court)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) On the true construction of the law, the cut-off date for assessment of damages should be the date of final judgment *ie*, the order of the Court of Appeal dated 17 May 2013. However, there has been a shift in the modern approach in determining the cut-off date in assessment of

damages. A lot must depend on the circumstances of a particular case. The challenge lies in determining where essentially the scale of justice should tip in favour of. In the circumstances of this case, it would be a travesty of justice to the plaintiff if the cut-off date was fixed to be the market value of the subject properties at the date of the breach. Applying the approach in the case of *Johnson & Anor v. Agnew*, it would be most appropriate to fix the assessment date to the date of final judgment of the Court of Appeal. Following thereto, the case was ordered to be remitted before the DR for assessment of damages as at 17 May 2013. (paras 18, 19, 21 & 22)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif') dan responden ('defendan') memasuki satu perjanjian di mana defendan bersetuju menjual tiga bidang tanah ('tanah-tanah') kepada plaintif pada harga RM1.9 juta. Berikutan itu, plaintif membayar 10% harga belian bagi tanah-tanah tersebut. Walau bagaimanapun, defendan menangguhkan penandatanganan kontrak-kontrak tersebut atas alasan menunggu keputusan guaman yang belum selesai antara Syarikat Pertanian Emmal ('Emmal') dan defendan, di mana perkaranya adalah tanah-tanah tersebut ('Guaman 03'). Guaman 03 diputuskan menentang defendan dan defendan diarahkan menjual tanah-tanah tersebut kepada Emmal. Oleh sebab hartanah tersebut sudah tiada lagi, plaintif memulakan satu tindakan untuk ganti rugi terhadap defendan. Menurut A. 14A dan A. 33 k. 2 Kaedah-Kaedah Mahkamah 2012, Mahkamah Tinggi membenarkan tuntutan plaintif. Terkilan dengan keputusan tersebut, defendan merayu ke Mahkamah Rayuan tetapi rayuannya ditolak dan pihak-pihak meneruskan dengan pentaksiran ganti rugi. Semasa prosiding pentaksiran, isu di hadapan Timbalan Pendaftar ('TP') adalah, apakah tarikh yang efektif bagi pentaksiran ganti rugi. Plaintif menghujahkan bahawa ganti rugi boleh ditaksir dengan merujuk pada nilai tanah pada tarikh pentaksiran dibuat, iaitu, 1 Mei 2014. Sebaliknya, defendan menghujahkan bahawa tarikh untuk pentaksiran ganti rugi adalah tarikh pelanggaran iaitu, 30 Mei 2005 berikutan s. 74 Akta Kontrak 1950. Timbalan Pendaftar mentaksir nilai tanah setakat tarikh pelanggaran iaitu, 30 Mei 2005. Tidak berpuas hati dengan pentaksiran tersebut, plaintif merayu kepada Hakim dalam Kamar yang mengesahkan keputusan TP. Oleh itu, rayuan ini oleh plaintif.

Diputuskan (membenarkan rayuan dengan kos di sini dan mahkamah di bawah; mengetepikan keputusan Mahkamah Tinggi)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Menurut pentafsiran sebenar undang-undang, tarikh tamat bagi pentaksiran ganti rugi sepatutnya adalah tarikh keputusan akhir, iaitu perintah Mahkamah Rayuan bertarikh 17 Mei 2013. Walau bagaimanapun, terdapat perubahan dalam pendekatan moden untuk menentukan tarikh tamat bagi pentaksiran ganti rugi. Kebanyakannya

bergantung pada hal keadaan kes tertentu. Cabarannya adalah dalam menentukan, pada asasnya, di mana terletak keadilan. Dalam keadaan kes ini, tidak adil bagi plaintif jika nilai hartanah pada tarikh pelanggaran ditetapkan sebagai tarikh tamat. Mengguna pakai pendekatan dalam kes *Johnson & Anor v. Agnew*, adalah amat wajar untuk menetapkan tarikh pentaksiran pada tarikh penghakiman terakhir Mahkamah Rayuan. Dengan itu, kes ini dperintahkan dikembalikan semula ke hadapan TP bagi pentaksiran ganti rugi setakat 17 Mei 2013.

Case(s) referred to:
Central Malaysia Development Co Ltd v. Chin Pak Chin [1967] 1 LNS 15 HC ***(refd)***
Johnson & Anor v. Agnew [1980] AC 367 ***(foll)***
Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd [1987] 1 LNS 79 HC ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1994] 1 LNS 284 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74
Rules of Court 2012, O. 14A, O. 33 r. 2

For the appellant - Edwin Tsen; M/s Tan Pang Tsen & Co
For the respondent - Lau Cheung Hoon; M/s Jayasuriya Kah & Co

[Editor's note: Appeal from High Court, Sandakan; Civil Suit No: S-22-36-2010 (overruled).]

Reported by S Barathi

JUDGMENT

Abang Iskandar JCA:

Brief Facts Of The Case

[1] On 10 November 2004, Sime Darby Industrial Sdn Bhd ("the defendant") agreed to sell the three parcels of land ("the said lands") through an estate agent, WTW Real Estate Sdn Bhd, to Chin Kui Foh ("the plaintiff") at the agreed price of RM1.9 million.

[2] After the terms of the sale and purchase agreements ("the agreements") have been agreed, the plaintiff prepared and signed three formal contracts. The contracts were dated 10 December 2004.

[3] The contracts were sent to the defendant for execution. Pursuant to the agreements, the plaintiff paid a sum of RM38,000 on 22 November 2004, being the earnest deposit, and a further sum of RM152,000 on 31 December 2004. The total sum of RM190,000 paid presented 10% of the purchase price for the lands.

[4] After the sale was concluded, the defendant, however, deferred the signing of the contracts on the reason that there was a Civil Suit No. 22-03 of 2005 ("Suit 03") between Syarikat Pertanian Emmal Sdn Bhd ("Emmal") and the defendant which was pending. The subject matter of Suit 03 involving the said lands.

[5] As it unfolded, the Suit 03 was decided against the defendant. The learned trial judge ordered the defendant to sell the said land to Emmal. The defendant did not appeal against the said decision.

[6] As the property was no longer available, the plaintiff commenced this action against the defendant, for damages.

[7] The present action was decided pursuant to O. 14A and O. 33 r. 2 of the Rules of Court 2012.

[8] On 9 February 2012, the High Court decided the issues in favour of the plaintiff. The plaintiff's claim was allowed and the High Court ordered as follows:

(a) Damages to be assessed;

(b) Interest at 8% per annum from 10 December 2004 until judgment;

(c) Statutory interest at 8% per annum from date of judgment until full payment; and

(d) Cost on a full indemnity basis.

[9] Aggrieved with such decision, the defendant filed an appeal to the Court of Appeal. On 17 May 2013, the Court of Appeal dismissed the appeal and parties proceeded for assessment of damages.

[10] During the assessment proceedings, the issue before the Deputy Registrar ("DR") was what would be the effective date upon which to assess the damages.

[11] The plaintiff's stand was that the damages should be assessed by reference to the value of lands at the date of assessment. Plaintiff's valuation as at 1 May 2014 was RM6,788,000.

[12] On the contrary, the defendant submitted that the date to assess the damages is the date of breach ie, 30 May 2005. The defendant's valuation as at 1 June 2005 was RM2,220,000.

[13] The DR assessed the value of the land as at the date of the breach ie, 30 May 2005 based on the valuation report prepared by Mr Robin Chung York Bin of Messrs CH Willian Talhar & Wong. Thus, the sum of RM320,000 was awarded as damages to the plaintiff.

[14] Dissatisfied with the assessment, the plaintiff appealed to the judge in chambers. The learned High Court Judge affirmed the decision of the DR. Hence, this appeal before us by the plaintiff.

The Appeal

[15] We had heard this appeal on 19 July 2016. After perusing the records of appeal and submissions by both learned counsel, we had unanimously allowed the appeal with costs of RM15,000 here and below. This is now our reasoning for having so decided, where parties will be referred to as they appeared in the assessment of damages proceedings.

[16] Before us, the plaintiff submitted that the learned High Court Judge erred in law and in fact when he dismissed the plaintiff's appeal. It was because His Lordship failed to take into account of the recent decision of Malaysia courts and of the other Commonwealth jurisdictions which had adopted the modern approach when assessing damages for breach of contract for the sale of lands. It should be the date of final judgment, not later than the date of assessment. Where there was an appeal, it should be the date of the final judgment on appeal. The plaintiff referred to the case of *Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd* [1987] 1 LNS 79 where the court departed from the judgment in the case of *Central Malaysia Development Co Ltd v. Chin Pak Chin* [1967] 1 LNS 15. In the *Central Malaysia Development* case (*supra*), the court held that the value should be assessed at the time of the breach. The plaintiff also referred to case *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 1 LNS 284 where the Federal Court held that in a case involving a sale and purchase agreement, it warrants the assessment of damages to be at the date of the judgment.

[17] The defendant on the other hand, had argued for the date of breach ie, 30 May 2005 by virtue of s. 74 of the Contracts Act 1950.

[18] We also had occasion to look at other decisions on the matter at issue. What had appeared rather clear to us has been the fact that there has been a shift in the modern approach in determining the cut-off date in assessment of damages. Having done so, we found much guidance from the decision of the House of Lords of England in the case of *Johnson & Anor v. Agnew* [1980] AC 367 where the learned law lords, through the speech by Lord Wilberforce, had ruled that:

> The general rule for the assessment of damages is compensatory, ie that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach - a principle recognised and embodied in section 5 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix other date as may be appropriate in the circumstances.

[19] We could readily appreciate the difficulty in fixing the appropriate date to be used as the cut-off date on which to base the market price of the subject property. As such, the view as expressed by the House of Lords in the *Agnew* case (*supra*) is indeed a view which has much practical utility in

solving this issue. A lot must depend on the circumstances of a particular case. The challenge lies in determining where essentially the scale of justice should tip in favour of.

Our Finding

[20] This case had taken a few twists and turns and finally the plaintiff got to obtain what was rightfully due to him from the defendant who had reneged on the sale and purchase agreement on the subject landed property. The defendant had fought his case all the way to the Court of Appeal and granted that he was only prosecuting what was his legal right, he must also be aware that he would be liable to face an adverse monetary consequence as a result of the time lapse, should he fail in his endeavour. In this case, it had come in the form of the ever appreciating market price of the subject property.

[21] To recap, on the true construction of the law, the cut-off date for assessment of damages should be the date of final judgment ie, the order of the Court of Appeal dated 17 May 2013. In the circumstances of this case, it would be a travesty of justice to the plaintiff if the cut-off date was fixed to be the market value of the subject properties at the date of the breach. Applying the approach that was stipulated by Lord Wilberforce in the *Agnew* case (*supra*) fixing the assessment date to the date of final judgment of the Court of Appeal would be, to our minds, the most appropriate thing to do.

Conclusion

[22] Thus, we allowed the plaintiff's appeal with costs of RM15,000 here and below to be paid to the plaintiff subject to the payment of allocator fees. We set aside the decision of the learned High Court Judge which had affirmed the decision of the DR. We had further ordered that the case to be remitted to the High Court before the DR for assessment of damages as at 17 May 2013. Deposit was ordered to be refunded to the plaintiff.